California
INTERNATIONAL LAW
Section Newsletter

Vol. 11, No. 2-- Fall/Winter 1998

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Editor in Chief: Thomas R. Bennett
Associate Editor: John R. Walton
Current Developments Editor: John J. Stifter
Calendar Editor: John R. Walton

In its printed form, this volume aslo included information about StressBusters 1999, The State Bar Annual Meeting, the roster for the International Law Section Executive Committee, information on appointments to the International Law Section Executive Committee, and a calendar of international events through October 1999.

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LETTER FROM IMMEDIATE PAST CHAIR

David Hirson, Hirson Wexler Perl & Stark

It is with mixed emotions that I end my one-year term as Chair of the International Law Section. I was delighted and enthused by the ongoing support and encouragement received from all of the members of the Executive Committee. The sadness was that the State Bar was barely able to function during the past year as a result of the veto on its fees bill. Without proper funding and management, we were unable to fully action the requirements of our Section. We were also hamstrung in presenting any of the new programs, which I had envisaged for my term. The coming year will be better in that the funding for the Sections and its management has been put on a clearer track awaiting the decision of the California legislature as to whether the voluntary Sections will or will not remain as part of the State Bar. Provisions have been put in place for an alternate arrangement. An umbrella organization has been formed to house the voluntary sections of the State Bar in the event of need.

I was very pleased at our Section's ability to function within the limitations placed upon us.

International Law Weekend

The major event of our Section was the International Law Weekend which this year was held in co-sponsorhips with the Intellectual Property Section of LAWASIA. The event was held in San Francisco and was attended by more than 300 participants from all over the world as well as by our own own California members. Not only were the presentations of the highest caliber, but the social events, tours and excursions to Santa Clara Valley and to the wine country were exceptional and enjoyable.

The program was chaired and spearheaded on behalf of the international Law Section by Professor John T. ("Jack") McDermott who did an exceptional job and managed to pull rabbits from a hat when all things appeared to be working against us. A special tribute and thanks was given to Jack at the International Law Weekend, and I again thank him and his Committee for a splendid and successful effort.

MCLE Programs

The International Law Section also participated in the Education Institutes by putting on numerous presentations, which were also very well received by the audiences. Thank you to all the presenters for the hard work in preparing for and presenting the program.

StressBusters Weekend

We were successfully able to hold our 2nd Annual StressBusters Weekend. This was hosted and directed by Susan Liebeler with the able assistance of Linnet Harlen and others.

The second StressBusters Weekend, which took place in Palm Springs at the beginning of this year, was again a wonderful success and brought about enjoyment for the participants in a relaxed atmosphere with the

opportunity to learn from the continuing education courses and to network with colleagues while partaking (optionally) in the various exercise and yoga classes.

Executive Committee

The annual planning meeting was a successful event marred by the inability to fully plan the year because of the uncertainties which existed. Throughout the year I was supported by the whole of the Executive Committee and in particular by its officers whom I wholeheartedly thank for all of their efforts. I mention the officers by name because of the contributions and efforts to this Section and their ongoing support of me as the Chair. They are Jeffrey W. Shields of Irvine, the Immediate Past Chair for the prior year; Michael R. Tyler the Vice Chair and the Chair of Programs (he is now the Chair of the Section); Beth Greenwood who was our Treasurer and who spent countless hours pondering the complexities of the State Bar accounting systems and working on efforts to keep our Section fiscally balanced and within budget (she is now a Vice Chair of the Section); Professor John T. ("Jack") McDermott, our Secretary who fulfilled this function with great enthusiasm over and above his exceptional effort and the time he devoted to the International Law Weekend program.

The advisors, members and advisors emeritus of the International Law Section all contributed and assisted me in bringing to you the programs which we did. This is an exceptional feat particularly in the light of the unavailability of full-service from the State Bar and the uncertainty regarding the finances. Our members received uninterrupted service and the high standard of the service was maintained.

Conclusion

Finally, it would be remiss of me not to also thank our acting administrator Pam Wilson who filled in after the reduction in staff at t the State Bar while continuing with her position as the Director of Section Education and Meeting Services. In addition, were were initially assisted by Pres Soberon and have been assisted by other State Bar employees who have responded to each and every request of mine with efficiency and courtesy. Thanks to each and every one of them.

I wish all of our members of the International Law Section a very successful year and hope that you will all continue with your membership in the Section. Services will not only be maintained but under the leadership of our incoming Chair Michael Tyler, will no doubt be enhanced. I wish Mike the best of luck and know that his intellect and enthusiasm will enhance the International Law Section. Welcome and good luck to the incoming officers: Steven Smith and Beth Greenwood (Vice Chairs); Robert Cox (Secretary) and Keith Pershall (Treasurer), as well as to the new members and advisors.

Thank you,

David Hirson
Hirson Wexler Perl & Stark
Immediate Past Chair
International Law Section

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Immigration Law Update -- Fall 1998

11th HOUR LEGISLATION RAISES THE H-1B CAP AND PROVIDES FOR FURTHER PROTECTIONS FO U.S. WORKERS

David Hirson and Catherine I. Mayou, Hirson Wexler Perl & Stark
Los Angeles, Irvine, San Diego, Phoenix, Las Vegas, Shenzhen China

At the time of writing this article employers in high-technology industry foreign national professionals and immigration attorneys around the US are undoubtedly breathing a collective sigh relief. Today, October 21 1998, President Clinton signed into law FY99 Omnibus Appropriations bill (H.R. 4328) which included H.R. 3736, the "American Competitiveness Workforce Improvement Act of 1998." This legislation combines both the compromise H-1B bill, and the technical corrections measure.

Recognizing ineffectiveness of direct efforts to persuade certain members Congress to drop a last minute hold on the H-1B bill that was threatening prevent its timely consideration, immigration advocates devised an alternative aggressive, forward-looking strategy which proved to be the winning hand in the end. By shear persistence and proactive thinking, immigration advocates were able to convince Republican and Democratic Congressional leadership and the White House to include the H-1B bill in the omnibus measure Congress had to pass before it adjourned. With the signing into law of the Omnibus Appropriations bill, the number of the much-coveted H-1B visas has been increased from 65,000 to 115,000 available visas for fiscal year 1999, available immediately.

The H-1B visa category was established by Congress in the Immigration Act of 1990, for the purpose of providing a means for US businesses to employ certain qualified foreign individuals who are typically employed in "specialty occupations" abroad, on a temporary nonimmigrant basis.

The high-tech industry, in particular, has relied almost exclusively on the H-1B visa category to fill positions. There is a present well-documented inability to fill specialty occupation positions in the high-tech industry utilizing US workers alone, and the gravity of this situation is highlighted by the fact that the hardware and software industries combined currently account for approximately one-third of real economic growth in the United States. According to a study conducted on behalf of the Information Technology Association of America, there are more than 340,000 unfilled positions for highly skilled information technology workers in US companies. Department of Labor figures project that the US economy will produce more than 130,000 information technology jobs in each of the next ten years and that the US will produce less than a quarter of the necessary number of information technology graduates to fill these positions.

Prior to the enactment of the Immigration Act of 1990, the number of individuals who could obtain H-1B visas each fiscal year was unlimited. That Act established an annual cap of 65,000 H-1B visas that could be issued.

Until August 1997, the H-1B cap had never before been reached in any one fiscal y ear. As a result of the cap having been reached last year, US employers could not hire any foreign specialty workers until the start of the next fiscal year.

Employers who faced frustration in May of this year by not being able to count on the timely adjudication of "pipeline" H-1B cases, pending with the INS when the cap was reached, had their cases finally adjudicated in September. By the end of September, the INS was estimating that between 20,000 to 30,000 cap cases were pending at Service Centers, and that if Congress did not pass the much-debated H-1B legislation, the cap for Fiscal Year 1999 would probably be reached as early as December 1998.

The passage of H.R. 4328, however, removed the nasty possibility of deja vu. The increased number of H-1B visas should provide H-1B-dependent employers with a noticeable comfort-zone improvement, although H.R. 3736 does contain certain administrative and financial features which may be burdensome on some employers.

The journey leading up to this legislative development has been fraught with difficulties and obstacles, threatening defeat at every turn. On February 25, 1998, the Senate's Immigration Subcommittee held a hearing regarding worker shortages in high-technology industries and current US immigration policy. In his opening comments, Subcommittee chairman Sent. Spencer Abraham (R-Mich) stated that US companies are currently faced with "severe high-skill labor shortages that threaten their competitiveness in [the] new Information Age economy." Senator Abraham argued further that the skilled worker shortage calls for both a short-term and a long-term solution. The short-term solution addressed the pressing need to raise the H-1B cap, and the long-term solution addressed the need to revamp the US education system so as to provide more U.S.-born high-tech workers in the future. To achieve this end, the Senator introduced the American Competitiveness Act, S. 1723. On the 2nd of April 1998, and by a 12-6 vote, the Senate Judiciary Committee approved S.1723. However, on the 7th of May the inevitable occurred, and the H-1B cap of 65,000 visas for the fiscal year of 1998 was reached.

Due to mounting pressure from many concerned high-technology companies, the bill went to the Senate for consideration on the 18th of May. The Senate, by an overwhelming vote of 78 to 20 approved the "American Competitiveness Act" and thereby voted to allow up to 30,000 additional H-1B visas to be issued during the remainder of fiscal year (FY) 1998, with additional increases, if necessary, though FY 2002. Meanwhile, on the 20th of May, the Judiciary Committee of the House of Representatives, by a 23-4 vote, voted to approve the House H-1B companion bill (H.R. 3736) containing strict layoff and recruitment attestation requirements of H-1B employers. The Clinton Administration had indicated that it would veto any bill that did not include attestation provisions on grounds that the absence thereof would provide too few protections of US workers. The Clinton Administration thus supported the House version of the bill and threatened to veto the Senate measure.

H.R. 3736 was to have moved to the House floor for a vote in the first week of June, after Congress returned from its Memorial Day recess. However, the program was plagued by a progression of delays until finally on the 24th of September, by a vote of 288 to 133, the House of Representatives approved H.R. 3736. Following Congressional negotiations with the White House, however, several additional provisions to H.R. 3736 were proposed, and the technical corrections bill (H.Con.Res. 335) a consolidated measure (now the "American Competitive and Workforce Improvement Act of 1998") was submitted, however, not voted on. On the 20th of October, the House of Representatives passed the Omnibus Appropriations bill, containing the consolidated H-1B legislation, followed by the Senate, and finally the President's signature today.

The new H-1B Act immediately increases the cap on H-1B visas for a period of three years (1999: 115,000 visas; 2000: 115,000 visas; 2001: 107,500 visas), and then reverts back to a cap of 65,000 in the year 2002 and thereafter. The legislative compromise, however, places new obligations on employers, especially H-1B dependent employers, that must be complied with or be faced with harsh sanctions. An "H-1B dependent employer" is determined according to the following scale: An employer who has 1-25 full time equivalent employees in the US, more than seven of whom are H-1B beneficiaries, or an employer who has a workforce of 26-50 employees, more than 12 of whom are H-1B beneficiaries, or in, in the case of an employer that has more than 50 employees -- if 15% or more of the workforce are H-1B beneficiaries. New Labor Condition Application (LCA) attestation requirements will obligate H-1B dependent employers and employers who have committed willful LCA violations to attest to the fact that no US worker in an essentially equivalent position will

be displaced within the 90 days preceding as well as the 90 days that follow the filing of an H-1B petition. Implementation of the new attestation requirements will become effective only upon publication of final regulations by the INS. IN addition, a new fee of $500 (over and above the present INS filing fee) will be imposed on petitioning employers at the time of filing an initial petition, the first petition to extend H-1B status, and a petition by a different employer for concurrent or new employment. The fee, which will become effective on the 1st of December 1998, will not be imposed on additional extensions of H-1B status, or amended petitions that do not ask for an extension of status. This fee will be collected by the Attorney General and will be applied to fund scholarship and training programs for US students and workers, and to fund the Department of Labor's efforts to administer and enforce activities under the H-1B program.

Moreover, new penalty provisions, a no "benching" rule, and benefits requirements have become immediately effective upon the enactment of the new H-1B Act. Employers can be fined $10000 and face debarment from participation in the H-1B program for at least one year due to a failure to meet the attestation requirements, or in the case of willful violations, an employer can be fined $50000 and be subject to a period of debarment of not less than two years. In the case of willful failure or willful misrepresentation of material fact regarding the displacement attestations, an employer can face a fine of #35,000 and a period of debarment of three years. The no "benching" rule requires employers to pay H-1B employees the full wage stated on the LCA, regardless of whether the employee is in nonproductive status or not. Employers are also now obligated to offer H-1B nonimmigrants benefits on the same basis and according to the same criteria as are offered to US workers.

This new legislation, enacted in the nick of time, will bring the nation's high tech industry one step closer to averting a nationwide skills crisis. It also ensures that the US will be able to maintain its economic competitiveness, by having access to the world's best and brightest, while at the same time providing stringent protections for US workers against unfair labor practices. The Act also introduces machinery to implement an important social goal -- it provides for the investment of approximately $75 million in upgrading skills of the US workforce and provides funding for college scholarships for US applicants.

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Current Developments

NEWS FROM AROUND THE WORLD

Editor: John J. Stifter

Student Reporters:
– Christopher Martin/UCLA Law School
– Susan L. Andrews/Southwestern Law School

CLAIMS AGAINST IRAQ

Corporate Claims Awarded by U.N. for Gulf War

The United Nations in July awarded companies from India, Kuwait, Korea and Russia a total of $187.4 million in damages for losses directly linked to the Persian Gulf War. However, the companies had sought $2 billion dollars for non-oil corporate claims. The decision establishes precedent that the UN will only consider such claims for losses inflicted after May 2, 1990 and which are directly linked to the war. While the UN Compensation Commission rulings may not be appealed, claimants can seek compensation from Iraq through diplomatic channels. The UN also resolved individual claims by awarding compensation totaling $739.7 million. The awards are paid from UN funds, generated by the sale of Iraqi crude oil sales under the UN food-for-oil agreement.

INTERNATIONAL TAX

Tax Liability May Arise from Euro Conversion

U.S. tax issues may arise from the unification of European currency to occur on January 1, 1999. Although unlikely, the conversion of monetary instruments into the new Euro currency may be a "deemed sale or exchange" under the US Tax Code. The conversion may cause losses or gains to be accelerated for US companies with a presence in Europe. An additional issue for US companies is whether expenses to adapt to the new currency, such as costs for software, reprogramming and staff training, must be capitalized. The US Treasury Department plans to issue guidance in late 1998.

INTERNATIONAL CONTRACTS

Contract Liability May Arise from Euro Conversion

Companies doing business in Europe may need to consider whether existing contracts require modification or may require being entirely revised, due to the unification of European currency. Some contractual issues may need to be addressed in order to ensure compliance with European regulations to avoid an interruption in business dealings or to preserve the rights and obligations of parties.

INTERNATIONAL BANKING

Reliance on Foreign Banks May Create Liability for US Companies

US companies which rely on foreign banks for funding and other services must ensure that such banks have taken adequate steps to prepare for the Year 2000 and Euro conversion complications. A failure to review such banks' preparedness for these issues may create legal liability for the companies. Derivative suits may arise from shareholders' claims that the Directors breached their fiduciary duty by failing to avoid foreseeable complications with the banks. An additional concern is that a material omission may occur if companies fail to disclose the Year 2000 preparedness of their banks on the companies' financial and SEC registration statements.

INTERNATIONAL EQUITY

Second Circuit Approves Use of Preliminary Injunction to Freeze Assets Worldwide

In cases seeking only money damages, plaintiffs may obtain a preliminary injunction to freeze defendants' foreign assets, whether or not the assets are the subject of the underlying litigation. In so holding, the Second Circuit joined the First, Third and Ninth Circuits and split from the Fifth and Eleventh Circuits. This "Mareva Injunction" first developed in English courts, and is based on the principle that no court should allow a defendant to frustrate subsequent court orders. It is designed to deter contemptuous defendants from trying to conceal or transfer assets to evade judgment. To refute concerns over such relief, the Second Circuit cited England's long success in issuing such injunctions in situations very similar to this case.

INTERNATIONAL LABOR

ADEA Now Triggered by Foreign Firms' Non-U.S. Employees

The Second Circuit held that the US operations of a foreign company fall under the Age Discrimination in Employment Act (ADEA) and that the foreign employees should be counted toward satisfying the requisite number of employees to trigger ADEA coverage. The ADEA applies to employers having 20 or more employees. Prior to this decision, ever federal district court held that only a foreign employer's US employees were to be included in this calculation. This decision should alert foreign companies who limit the number of US employees to less than 20 so as not to violate the ADEA.

FOREIGN & COMPARATIVE LAW

JAPAN

Japan's Intellectual Property Law Revisions Insufficient

Japan has implemented modest intellectual property reforms to harmonize its law with international standards and to enhance the intellectual property rights protection. Japan's intellectual property law revisions become effective January 1, 999. The revisions enhance remedies, toughen design protection, and lower tariffs. Although the revisions make the Japanese patent system more favorable to patentees, it continues to fall short by US standards in such areas as treble damages, criminal penalties, attorneys fees, and document discovery. Specifically, a party who infringes a patent and looses a law suit may in some cases pay less than if they had obtained a license.

CHINA

China's Supreme Court Conditionally Accepts Taiwanese Rulings

China's Supreme Court has decreed that Taiwanese civil court rulings and institutional arbitration awards shall be accepted and recognized as valid law in China, after confirmation by Chinese courts. This timely decision moves toward creating a fair and effective system to protect the rights of the parties. However, a representative of the Court said that this does not imply that China has accepted Taiwan's legal system, nor that China in any way relinquishes their claim of legal and administrative power over Taiwan.

Use of Term "Whisky" Deemed Misleading

The Court of Justice held that Community Regulation concerning the definition, description and presentation of spirit drinks precludes the use of descriptive terms outside the meaning of the Regulation, unless the Commission authorizes such use under its derogating power. This power is limited by the need to avoid consumer confusion between different products. Here, the Scotch Whiskey Association of Scotland sued companies participating in the sale of a whisky blend of under 40% alcoholic strength under the trademark "Gold River." The Court ruled that while "Gold River" was a spirit drink within the meaning of the Regulation, the term "whisky" could not be used because the drink's alcoholic strength was under 40%.

Court of Justice Determines Standard for Misleading Food Labeling

The Court of Justice held that national courts must consider the presumed expectations which a statement or description designed to promote sales of eggs evokes in an average consumer who is reasonably well-informed, observant and circumspect. However, where a national court has difficulty in determining this, it may resort to a consumer poll or experts for guidance. This judgment was a response to the German Federal Administrative Court's question as to the proper standard for interpreting Community Regulation on marketing standards for eggs, after the lower court had found the description "six-grain -- 10 fresh eggs" liable to mislead consumers by falsely implying that the hens' feed is made only of six cereals and that the eggs were unique.

Equal Treatment Requires Job Security for Women During Pregnancy

The Court of Justice recently expanded the principle of non-discrimination against women. The Court ruled that anti-discrimination laws prevent an employer from using sickness during pregnancy against a woman for job security reasons. Protections already existed to prevent the firing of a woman during maternity leave. A woman "cannot be dismissed anytime during pregnancy for absences resulting from illness arising from that pregnancy, nor can such absences be computed into the period warranting dismissal under national law. The Court reasoned that such dismissals can only affect women and therefore are sex discrimination. This ruling arose after a British employee was dismissed due to absences resulting from pregnancy-related illness. The House of Lords then asked the Court to interpret Community Law regarding equal treatment for men and women.

PUBLIC INTERNATIONAL LAW

First Former Soviet Republic to Join WTO

The WTO announced in mid-July that the Kyrgyz Republic is slated to become the next and 133rd member of the World Trade Organization. Membership will be complete when accession is formally approved by the WTO General Council and ratified according to the Kyrgyz Republic's national procedures. Formalization of the accession will make the Kyrgyz Republic the first former Soviet republic to be admitted to the WTO and put it ahead of 31 other countries currently seeking WTO admission.

China Promises to Sign Bill of Rights Pact

The Chinese Government indicated during a recent visit of the UN High Commissioner for Human Rights that it is willing to sign the UN Covenant on Civil and Political Rights as early as October of this year. If China were to adhere to the covenant, it would effectively mandate sweeping changes of the country's political landscape, including requirements for a multiparty system and civilian checks on rights abuses. Democracy activists and observers outside China, however, remain skeptical that China will faithfully adhere to the provisions of the covenant. A UN covenant on economic, social and cultural rights signed by China in 1997 has yet to be ratified by China's head lawmaking body, the National People's Congress.

Landmine Ban Becomes International Law

An international treaty banning the production, export and use of antipersonnel landmines gained the force of international law in September after Burkina Faso became the 40th nation to ratify the treaty. Over 120 nations are signatories of the treaty to date. Negotiations for the treaty began in Ottawa, Canada two years ago and the terms of the treaty provide for it to enter into effect on March 1, 1999. Although welcomed by Canada, the U.K. and other signatory nations as a strong statement of international will to end the ongoing human suffering inflicted by landmines, countries that have not signed the treaty, including the major powers of China, India, Russia, and the United States, continue to cast a shadow over the success of the treaty.

International Criminal Court Leaves US Behind

A permanent International Criminal Court with the power to try cases of genocide, war crimes, crimes against humanity and crimes of aggression, became a reality in July after delegates from 120 countries voted in support of it. Among the mere seven countries that voted against the treaty was the United States, due largely to the failure by US negotiators to obtain guarantees that US military personnel would not be tried without consent of the US government. The US has because of this fact threatened to actively oppose the new court. The court will not actually be established until the treaty is ratified by at least 60 signatory countries, a process that is expected to take years, and of which success is at least somewhat uncertain.

INTERNATIONAL LAW AND BUSINESS

First Trans-Atlantic Merger Expected to Be Only the Beginning

New York-based law firm Christy & Viener's September announcement that it will merge with the European law firm Salans Hertzfeld & Heilbronn, the first ever transatlantic law firm merger, is expected to be only the beginning of what many observers expect to be a growing wave of transatlantic mergers. These types of mergers are expected to increase as large law firms strive to provide globalized legal services and "one-step" expertise for sophisticated international clients. More frequent but informal overseas "alliances" are increasingly being seen as inadequate by US and European lawyers for effectively dealing with clients on both sides of the Atlantic. Among the factors behind the expected boon in transatlantic mergers are the January 1999 start of the Euro currency, and the resultant consolidation of European industry and financial services.

Thailand Set to Reform Foreclosure Law

Although analysts and lawyers in Thailand largely agree that the country's foreclosure laws are desperately in need of reform, observers predict only limited success for the Thai government's current bankruptcy legislation reform efforts. The Thai Government has promised the IMF amendments to improve court proceedings involving disclosure, including reductions of procedural delays, limits on the discretion of judges and an allowance for the entry of default judgments. However, some analysts expect the reforms to amount to little more than a timely stop-gap measure. Later reforms are planned that promise to broaden the range of assets

that can serve as collateral. Amendments to the foreclosure laws are considered a crucial part of the ongoing economic reform of Thailand. Bank loans in an amount necessary to restart the shaken economy are likely only if banks are assured of credible legal protection.

Indonesia's New Bankruptcy Law Put to the Test

A suit by creditors in September against a property development company in Indonesia constituted the first test of Indonesia's new bankruptcy law. The new bankruptcy became effective August 20, 1998 as a condition of the current IMF reform package. The new law establishes a commercial court to hear bankruptcy disputes and provides for proceedings to begin within 30 days of a suit being filed. After bankruptcy is declared, appeals must be heard within 30 days. Partly because the new law is largely untested, Indonesian lawyers are still advising on the preference of conducting out-of-court settlements, rather than bringing disputes before the new court. To encourage settlement, debtors and creditors are given 270 days under the new law to reach settlement before court bankruptcy proceedings begin.

INTERNATIONAL LITIGATION

Conflict Over Japanese Internment Reparations Crosses Borders

In an effort to settle a class-action discrimination suit brought against it, the US Government in June offered a letter of apology and $5,000 to each of more than 2,2000 Japanese Latin Americans who were interned by the United States during World War II. The Japanese Latin Americans were forcibly deported to the United States and detained in internment camps between 1941 and 1945. Although interned Japanese Americans have been eligible for reparation payments of $20,000 per person since the Civil Liberties Act was passed in 1988, Japanese Latin Americans have been told they are not eligible for the same amount of reparations because they were illegal aliens during the time of internment.

US Enforcement Falls Short in Suits Against Iran

At least two federal judges have in recent months issued multi-million dollar judgments against the Iranian government for acts of terrorism against US citizens, though effective enforcement appears unlikely. A federal judge in March ordered the Iranian government to pay $247.5 million in civil damages to the family of a victim of a terrorist attack in Israel that was allegedly financed by the Iranian government. In September, Iran was order to pay $65 million dollars in civil damages to three former US hostages held in Lebanon. Both suits were brought under a 1996 federal law that allows US citizens who are victims of terrorism abroad to bring suit in US courts against countries that are designated as "state sponsors of terrorism" by the State Department. The Iranian government has publicly dismissed the judgments in both cases, and enforcement appears increasingly uncertain. The US government, for example, recently asked one of the two courts not to force sales of property in the US, of properties owned by the Iranian government in order to enforce a judgment because of obligations under various US statutes and the Vienna Convention on Diplomatic Relations.

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Current Developments

VIRTUAL JURISDICTION: PERSONAL JURISDICTION BASED UPON ELECTRONIC CONTRACTS

By Charles S. Baldwin, IV, Esq.

The growing use of the "internet" or World-Wide Web" for communication and commercial purposes has forced U.S. courts to consider the circumstances in which purely electronic contacts with a jurisdiction may lead to the assertion of personal jurisdiction over a party. At least three federal Appellate Courts have now addressed this issue, as discussed below.

In *Compuserve, Inc. v. Patterson,* the Sixth Circuit found the Defendant's purely electronic contracts with the forum state sufficient to confer jurisdiction. CompuServe was a computer information service headquartered in Ohio. Defendant Patterson, a resident of Texas, entered into several agreements via the Internet with CompuServe Patterson subscribed to CompuServe and also entered a Shareware Registration Agreement ("SRA") with CompuServe Pursuant to the SRA, Patterson electronically transferred 32 software files to CompuServe and also sold his software products to various purchasers, including approximately 12 in Ohio. The SRA also provided that it was entered in Ohio and subject to Ohio laws. When Patterson complained via the Internet to CompuServe that CompuServe was violating certain of his trademarks, CompuServe filed a declaratory judgment action concerning the parties' respective trademark rights and sought personal jurisdiction over Patterson.

Patterson filed a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., and the Court framed its inquiry as, "Did CompuServe make a prima facie showing that Patterson's contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause [of the US Constitution], to support the district court's exercise of personal jurisdiction over him?" The Court observed that the "crucial federal constitutional inquiry" is whether the nonresident defendant has sufficient contacts with the forum state that the court's exercise of jurisdiction comports with the "traditional notions of fair play and substantial justice" set forth in *International Shoe Co. v. Washington* and its offspring.

The Court defined the constitutional inquiry as:

First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

The CompuServe Court then applied the facts of the case to each of these three criteria. The Court concluded that in the context of a 12(b)(6) motion, where the Court must view the facts in the light most favorable to

CompuServe, Patterson's purposefully contracting with CompuServe to market Patterson's software in other states made it reasonable to subject Patterson to suit in Ohio, the forum state of Compuserve's headquarters. The Court expressly noted, however, that it did not pass judgment on whether personal jurisdiction based upon purely electronic contracts with a forum would be proper in other contexts.

In *Bensusan Restaurant Corp. v. King,* the Second Circuit considered whether an Internet web site advertising a small Missouri jazz cabaret was sufficient contact with the State of New York for the Court to assert jurisdiction under the New York long-arm statute in a Trademark infringement case. Plaintiff Bensusan Restaurant Corporation claimed that the individual Defendant Richard B. King's Internet advertisement for his cabaret "The Blue Note" violated "The Blue Note" trademark of Plaintiff's "enormously successful jazz club in New York City." The Court analyzed the specific provisions of the state long-arm statute and determined that the conduct complained of did not satisfy the statutory provisions.

The Court first considered whether Defendant had committed a tort within the state for purposes of jurisdiction under CPLR § 302(a)(2). The Court found particularly significant the facts that the acts giving rise to the lawsuit, including the authorization and creation of King's web site, were performed by persons physically present in Missouri and not in New York. The Court, therefore, ruled that Defendant's conduct did not satisfy the "within the state" criteria, which the Court interpreted to require an act physically within the state.

The Court then considered whether jurisdiction was proper under CPLR § 302(a)(3), which applies "to persons who expect or should reasonably expect the tortious act to have consequences in the state and in addition derive substantial revenue from interstate commerce." The Court ruled that these criteria were also unsatisfied, as Defendant King did not derive substantial revenue from interstate commerce.

The Bensusan Court, therefore, engaged in a very narrow, technical reading of the long-arm statute, rather than a Constitutional analysis, to decline to exercise jurisdiction. It is unclear how the Court would have ruled if the Defendant's web site had been interactive, such as one offering goods for sale, rather than being a purely "passive" informational site.

The Ninth Circuit was faced with a case factually similar to Bensusan in *Cybersell, Inc. v. Cybersell, Inc.* The Court addressed the issue of whether the allegedly infringing use of a service mark in a home page on the World Wide Web suffices for personal jurisdiction in the state where the holder of the mark has its principal place of business. The Plaintiff in Cybersell was an Arizona corporation that advertised for commercial services under the registered trademark "Cybersell". The Defendant was a Florida corporation that offered web page construction services under the "Cybersell" name. Like the Second Circuit in Bensusan, the Ninth Circuit in Cybersell declined to exercise jurisdiction over the out-of-state Defendant where the web sit was passive in nature.

Unlike the New York long-arm status at issue in Bensusan, however, Arizona Rule of Civil Procedure 4.2(a) allowed personal jurisdiction over a nonresident to the maximum extent allowed by the federal Constitution. The Cybersell Court, therefore, applied a constitutional "minimum contacts" analysis and ruled that "it would not comport with 'traditional notions of fair play and substantial justice'...for Arizona to exercise personal jurisdiction over an allegedly infringing Florida web site advertiser who has not contracts with Arizona other than maintaining a home page that is accessible to Arizonians, and everyone else, over the Internet. In dicta, however, the Court did not foreclose the possibility that jurisdiction based upon electronic contacts may be proper in some contexts:

> In sum, the common thread [in Internet jurisdictional case law]...is that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."

None of the foregoing Circuit Courts set forth bright-line tests for when personal jurisdiction is proper, based upon purely electronic contacts with a forum. In fact the CompuServe and Cybersell Courts suggested in dicta that electronic jurisdiction will continue to be analyzed according to the traditional Constitutional notions set forth in International Shoe Co. and its progeny. It is also likely that Courts will draw analogies to familiar, non-electronic conduct, such as the entry into paper contracts and physical acts and presence in a forum.

PRACTICE NOTE:

The foregoing cases suggest, but do not require, a distinction between merely passive websites which advertise or communicate information and interactive websites by which a person may order products or services. Significant factors in the personal jurisdictional analysis, therefore, may include:

- whether a web site is passive or active;
- whether there is a pattern of sales or conduct directed at the forum state;
- whether an electronic contract was entered; and
- whether such contract sets forth the applicable jurisdiction or law.

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Current Developments

OTHER ACTIVITIES OF INTEREST

Bureau of Export Administration's Western Regional Office (WRO)
Export Licensing Workshop, November-December, 1998
San Diego, Los Angeles and San Jose, California

THE WRO will hold a workshop for anyone who exports products, services or technology, or would like to enter this field. This is a full-day program that will guide you through the requirements of the Export Administration Regulations (EAR). Detailed training materials will be provided to all attendees. The workshop includes hands-on learning exercises. It will explain the structure of the EAR, focusing on: the scope of the Export Administration Regulations; the steps to take to determine the export licensing requirements for your commodity, technical data or software; when you can export or re-export without applying for a license; how to apply for an export license or export control classification number; and export clearance procedures and record-keeping requirements. Approved for 6 hours of MCLE credit. For information, contact FITA at tel: (800) 969-3482 or fax: (703) 391-0159.

American Society of International Law
Annual Meeting, March 24-27, 1999
ANA Hotel, Washington, D.C.

The Deputy Secretary-General of the United Nations, Louise Frechette, will be the keynote speaker at the 1999 ASIL Annual Meeting. Ms. Frechette's address is entitled: "On Violence, Money, Power and Culture: Reviewing the Internationalist Legacy." A discussion of her remarks will then follow, during the Annual Dinner. For information, contact Kattie Lee, Tel: (202) 939-6000 or fax: (202) 797-73133.